

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 116 of 1991
with
LETTERS PATENT APPEAL NO. 255 of 1991
in
SPECIAL CIVIL APPLICATION NO. 1490 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? No
 2. To be referred to the Reporter or not? No :
 3. Whether Their Lordships wish to see the fair copy : YES
of the judgement? No
 4. Whether this case involves a substantial question : YES
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?No :

L.P.A.No. 116/91
B.A.SHAH Vs. The State of Gujarat & Ors
L.P.A.No. 255/91
The State of Gujarat & Ors. Vs. B.A.Shah

Appearance:

MR. S.M.SHAH for appellant in L.P.A. 116/91
MR. S.T.MEHTA, A.G.P. for respondents in LPA
No.116/91
MR. ST MEHTA, A.G.P. for appellants in LPA 255/91
MR SM SHAH for respondent in LPA 255/91

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE P.B.MAJMUDAR
Date of decision: 29/11/1999

ORAL JUDGEMENT

(Per : Panchal, J.)

These two appeals, which are filed under Clause 15 of the Letters Patent, are directed against judgment dated January 25, 1991 rendered by the learned Single Judge in Special Civil Application No. 1490/80. As common questions of facts and law are involved in these two appeals, we propose to dispose of them by this common judgment.

2. The appellant in Letters Patent Appeal No. 116/91 is the original petitioner and for the sake of convenience we propose to refer to him as 'original petitioner' in this judgment. He was recruited as Foreman-Instructor at I.T.I., RAjkot in April, 1968. The respondents no.3 & 4 were recruited as Foreman-Instructor in the year 1970 & 1971 respectively. A seniority list of Foremen-Instructors was published on April 11, 1978. Therein, name of the original petitioner appeared at serial no.16; whereas names of respondents no.3 & 4 were shown at serial nos.18 & 21 respectively. The next higher post for promotion from the post of Foreman-Instructor is that of Superintendent Gr.I. From the post of Superintendent Gr.I, the next higher post for promotion is that of Principal Class-II and the next stage of promotion is to the post of Principal Class-I. The respondents no.3 & 4 were promoted on officiating basis to the post of Superintendent in the year 1979 and at that time original petitioner was holding additional charge of Principal, I.T.I. Jamnagar. However, the respondents no.3 & 4 were regularly promoted to the post of Principal Cl.II by an order dated May 27/29, 1980. Thereupon the original petitioner filed Special Civil Application No. 1490/80, inasmuch as he was denied promotion to the higher post, while those who were junior to him were promoted. The learned Single Judge before whom the petition was placed for admission hearing, admitted the petition and by way of interim relief directed the respondents not to disturb the then existing post of the original petitioner. Accordingly, the original petitioner continued to work on the post of Principal Cl.II. Subsequently, during the pendency of the petition he came to be promoted to the post of Principal Cl.I in the year 1983. In view of this development which took place during the pendency of the petition, the point which was considered by the learned Single Judge was whether the original petitioner was entitled to deemed date of promotion with effect from the date on which the respondents no.3 & 4 were promoted to the post of Superintendent and then to the post of Principal Cl.II.

3. The respondents no.3 & 4 had filed affidavit-in-reply stating, inter-alia, that they had no objection to the original petitioner being treated as senior to them in the cadre of Superintendent Gr.I as well as in the cadre of Principal Cl.II and Principal Cl.I. It was also stated by them in the reply that they had no objection if deemed date of promotion was given to the original petitioner, to the post of Superintendent with effect from September 16, 1979 and to the post of Principal Cl.II with effect from May 29, 1980 as well as to the post of Principal Cl.I with effect from October 28, 1983.

4. The respondents no.1 & 2 controverted the averments made in the petition by filing affidavit-in-reply and averred, inter-alia, that the criterion of eligibility for promotion from the post of Foreman-Instructor to the post of Superintendent is that a person should hold a diploma in second class in Mechanical Engineering as required by Rules known as "The Gujarat Superintendent in Technical Highschool (Recruitment) Rules, 1968" (for short "Rules of 1968") made in exercise of the powers conferred by proviso to Article 309 of the Constitution of India and as the original petitioner was not possessing second class diploma in Mechanical Engineering, he was not entitled to be promoted to the post of Superintendent in preference to respondents no.3 & 4. In the reply, it was further mentioned that in view of the Rules called "Principal, Industrial Training Institute and the Principal, Government Industrial Training Workshop (in the Gujarat Education Service Class-II) (Administrative Branch) Recruitment Rules, 1975" (for short "Rules of 1975"), appointment to the post of Principal can be made either by promotion of a person of proved merits and efficiency from amongst the persons working in the cadre of Superintendent or by direct selection and to be eligible for promotion/direct selection, a candidate must possess (i) a degree in Mechanical Engineering or Mechanical or Electrical Engineering of a recognised University or its equivalent qualification, or (ii) a diploma, atleast in second class in Mechanical Engineering or Mechanical and Electrical Engineering or Automobile Engineering of a recognised Institution and as the original petitioner did not possess requisite qualifications, he was not entitled to the reliefs claimed in the petition.

5. After hearing the learned Counsel for the parties, the learned Single Judge by judgment dated January 25, 1991 has declared that the appointment of

respondents no.3 & 4 prior in point of time to the original petitioner was not legal and valid. As the original petitioner was already promoted to the post of Principal Cl.I, it was directed that the respondents shall give deemed date of promotion to him in the cadre of Superintendent Gr.I with effect from September 16, 1979 i.e. the date on which persons junior to him were promoted and in the cadre of Principal Cl.II with effect from May 29, 1980 i.e. the date on which the respondents no.3 & 4 were promoted to the said post. Regarding fixation of seniority, it was directed that the respondents shall decide the said question in the light of directions contained in the judgment after hearing the original petitioner and respondent no.5 who was directly recruited to the post of Principal Cl.II on November 1, 1980 and who was subsequently promoted to the post of Principal Cl.I vide order dated October 28, 1983 during the pendency of the petition. The learned Judge further directed the respondents no.1 & 2 to fix the original petitioner in the appropriate payscale, after granting deemed date of promotion to him and pay the difference of salary only with effect from the date on which he was actually promoted. The respondents were also directed to consider the case of the original petitioner for promotion to the post of Principal Cl.I after granting deemed date of promotion pursuant to the directions given in the judgment. The above referred to judgment has been challenged by the State Government as well as Director of Employment and Training, Gandhinagar in Letters Patent Appeal No.255/91; whereas that part of the judgment by which the original petitioner is denied payment of difference in salary from the deemed date of promotion to the actual date of promotion, is challenged by him in Letters Patent Appeal No. 116/91.

6. Mr. S.T.Mehta, learned A.G.P. submitted that as the original petitioner was not having diploma, atleast in second class in Mechanical Engineering or Mechanical and Electrical Engineering, the petition ought to have been dismissed by the learned Single Judge. It was pleaded that while allowing the petition, the learned Single Judge has relaxed requirement of rules for promotion framed in exercise of powers conferred by proviso to Article 309 of the Constitution of India, which is not permissible to a Court of law hearing petition under Article 226 of the Constitution and, therefore, the appeal should be allowed. What was claimed was that by the time petition was decided, the rules known as "Principal/Senior Surveyor/Technical Officer/Training-cum-Placement Officer/Trade Testing Officer, Gujarat Skill Training Service Class-II (Adm.

Branch) (Sr.Duty) Recruitment Rules, 1984 (for short "Rules of 1984") had already come into force and, therefore, reliefs should not have been granted to the original petitioner on the basis of the Rules which were framed in the year 1975. It was stressed that the learned Single Judge was not justified in granting deemed date of promotion to the original petitioner with effect from September 16, 1979 in the cadre of Superintendent Gr.I as well as deemed date of promotion with effect from May 29, 1980 in the cadre of Principal Cl.II and, therefore, Letters Patent Appeal No. 255/91 should be accepted.

7. Mr. S.M. Shah, learned Counsel for the original petitioner contended that words "second class" appearing in the Rules of 1975 should be construed as per the Manual of Technical Examination which provides that securing 45% marks and onwards is second class and as the original petitioner had secured 49% marks in diploma in Mechanical Engineering, judgment rendered by the learned Single Judge and directions issued therein should be upheld by this Court. Learned Counsel for the original petitioner submitted that requirement of the Rules is that in order to be eligible for promotion to the post of Superintendent Gr.I, a foreman-Instructor should have a diploma, atleast in second class in Mechanical Engineering, but it does not specify that the question whether a foreman-Instructor has obtained a diploma in second class in Mechanical Engineering should be judged from the certificate issued by competent authority and this question should be decided with reference to Manual of Technical Examination which was in force when promotional avenue opened. What was asserted on behalf of the original petitioner was that the original petitioner fulfilled relevant criteria for being promoted to the post of Superintendent Gr.I as well as promotion to the post of Principal Cl.II and, therefore, just directions issued by the learned Single Judge in the impugned judgment should not be disturbed. The learned Counsel for the original petitioner also pleaded that when direction was given to respondents no.1 & 2 to give deemed date of promotion to the original petitioner, the learned Single Judge should have ordered payment of difference of salary from the deemed date of promotion till actual date of promotion and, therefore, Letters Patent Appeal No. 116/91 should be accepted.

8. We have heard the learned Counsel for the parties at length. We have also taken into consideration the relevant documents which were produced on the record of Special Civil Application No. 1490/80. The fact that

the original petitioner had secured 49% marks in diploma Mechanical Engineering, is not in dispute. It is also not in dispute that at the relevant time a candidate was declared to have passed the final examination leading to the award of Diploma in the second class provided he obtained 50% or more of the combined aggregate marks of the last two Semester examinations of the final year course of study. As the petitioner had obtained less than 50% marks of the combined aggregate marks in the certificate issued by the competent authority, it was mentioned therein that he had obtained Pass Class. However, subsequently rules and regulations relating to Semester examinations leading to the award of Diploma/Post Diploma in Engineering and Technology were amended and passing standards were also modified. The amended passing standards are as under :-

"Rule.15 : A candidate shall be declared to have passed the final examination leading to the award of Diploma in the Second provided he obtains 45 per cent or more but less than 60 per cent of the combined aggregate marks for the last two Semester examinations of the final year course of study and further provided that he passes in all the Theory (external) Heads of the respective Semester examination at one and the same time.

Note: For the purposes of Rule-13, Rule-14 and Rule-15 above, a fraction of mark, if any, shall be ignored."

It is relevant to notice that respondents no.3 & 4 who were promoted to the post of Superintendent Gr.I, were recruited to the post of Foreman-Instructor in the year 1970 and 1971 respectively and had secured less than 50% of the aggregate marks, but in view of the provisions of Rule-15, which is quoted above, it was mentioned in their certificate that they had passed final examination leading to the award of diploma in the second class. A bare reading of Rule-15 makes it abundantly clear that whether a candidate has passed in the second class or not has to be decided with reference to per centage of marks obtained by him and not on the basis of Pass Class or Second Class mentioned in the certificate which may be issued by the competent authority to show that the candidate concerned has passed final examination leading to the award of diploma. The contention that recruitment rules of 1984 ought to have been taken into consideration by the learned Single Judge while deciding the petition filed by the original petitioner, is devoid of merits. It is an admitted position that promotional avenue opened

for the first time in the year 1979 and at that time, The Gujarat Superintendent in Technical High High School (Recruitment) Rules, 1968 as well as The Principal, Industrial Training Institute and the Principal, Government Industrial Training Workshop (in the Gujarat Education Service Class-II) (Administrative Branch) Recruitment Rules, 1975 were in force. The question of grant of deemed date of promotion to the original petitioner was required to be decided by the learned Single Judge. Under the circumstances, we are of the opinion that the learned Single Judge did not commit any error in referring to the Rules of 1975 while deciding the petition and Rules of 1984 which were brought into force during the pendency of petition, were neither applicable to the facts of the case, nor required to be interpreted while deciding the petition. As observed earlier, in the Rules of 1968 relating to the recruitment of Superintendent in Technical High School as well as in the Rules relating to recruitment to the post of Principal, Industrial Training Institute and the Principal, Service Class-II (Administrative Branch), the requirement is that a candidate should have a diploma atleast in second class in Mechanical Engineering or Mechanical or Electrical Engineering. The relevant Rules do not specify that question whether a candidate has secured second class or not should be judged in the light of remarks made in the certificate issued by the competent authority. That question is required to be determined with reference to per centage of marks obtained by a candidate. Therefore, when the question of promotion to the post of Superintendent arose in the year 1979, the question whether the original petitioner had passed diploma in Second Class in Mechanical Engineering ought to have been decided in the light of passing standards which were amended by the competent authority and which were in force in the year 1979. As the original petitioner had secured more than 45 per cent of the combined aggregate marks, respondents no.1 & 2 should have treated him as having passed the final examination leading to the award of diploma in second class. It is wellknown principle of Service Jurisprudence that in the case of direct recruitment, qualifications of a candidate have to be adjudged as on the date of making of application. Similarly, qualifications of a candidate for promotion should be adjudged when the promotional avenue opens. In this case, promotional avenue opened in the year 1979 and, therefore, his qualifications for promotion will have to be adjudged in the light of passing standards which were prescribed and applicable then. Under the circumstances, we are of the opinion that the contention that the original petitioner had

passed final examination leading to the award of diploma in the second class, is well-founded and deserves to be accepted. In this view of the matter, we are of the opinion that the ultimate directions which are given by the learned Single Judge in the impugned judgment cannot be regarded as erroneous or illegal in any manner. As the original petitioner should have been treated as having passed diploma atleast in second class, in Mechanical Engineering or Mechanical or Electrical Engineering, respondents nos.1 & 2 were not justified in superseding him in matter of promotion by promoting respondents no.3 & 4 to the post of Superintendent Gr.I. Thus, the original petitioner was not only entitled to deemed date of promotion, but is also entitled to consequential reliefs flowing there-from. As we have held that the question whether the original petitioner had obtained diploma, atleast in second class, in Mechanical Engineering, has to be decided with reference to passing standards modified by the competent authority at the time when promotional avenue opened, it is not necessary for us to go into question whether the learned Single Judge was justified in relaxing the relevant rules which are framed in exercise of powers conferred by the proviso to Article 309 of the Constitution. We find that the original petitioner was entitled to be promoted earlier in point of time than respondents no.3 & 4 and no ground is made out by the appellant in Letters Patent Appeal No. 255/91 to interfere with the impugned judgment. The said appeal is, therefore, liable to be dismissed.

So far as Letters Patent Appeal No. 116/91 which is filed by the original petitioner claiming difference of salary from the deemed date of promotion to the date of actual promotion is concerned, we find that at the time when the petition was filed the original petitioner was holding additional charge of Principal, I.T.I. Jamnagar and by way of interim relief, the learned Single Judge while admitting the petition had directed the respondents not to disturb the then existing post of the original petitioner. It means that the original petitioner was continued on the post of Principal, I.T.I. Jamnagar and was drawing salary for the said post. Moreover, during the pendency of petition, the original petitioner was promoted to the post of Principal Cl.I in the year 1983. In this view of the matter, we are of the opinion that the learned Single Judge was justified in not granting the actual difference in salary to the original petitioner from the deemed date of promotion till actual dates of promotions. The discretion exercised by the learned Single Judge in not granting

difference in salary to the original petitioner from the deemed date of promotions to the actual dates of promotions, cannot be said to be unreasonable or arbitrary in any manner so as to warrant interference of this Court in the appeal which is filed by the original petitioner. Therefore, there is no merits in Letters Patent Appeal No. 116/91 and that appeal is also liable to be dismissed.

For the foregoing reasons, both the appeals fail and are dismissed, with no orders as to costs.

(patel)